No. 14636

In the
United States Court of Appeals
For the Ninth Circuit

MITCHELL PAUL DOBRENEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of four years. [R 13-14]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. The Court has jurisdiction of this appeal under Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R 15]

*R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

Appellant was indicted under U.S.C., Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to submit to induction. [R 3]

Appellant pleaded Not Guilty, waived jury trial and was tried on December 14, 1954. [R 10-11] Appellant was convicted by Judge James M. Carter on December 20, 1954 [R 12-13] and sentenced on December 20, 1954. [R 13-14]

At the close of the evidence, a Motion for Judgment of Acquittal was made, argued and denied [R 7]; the motion was renewed and denied at the same time that a Motion for New Trial was made and denied. [R 11-13]

THE FACTS

In his Classification Questionnaire appellant set forth that he had no military experience [Ex 6]; that he had no court record [Ex 9]; that he was a conscientious objector and desired the Special Form for Conscientious Objector.

In his Special Form for Conscientious Objector [Ex 14-17] appellant set forth all the details requested concerning his religious training and belief. He showed he believed in a Supreme Being and that this belief involved duties which are superior to those arising from any human relation [Ex 14]; that he received this training and acquired this belief from his parents, his church (Molokan Spiritual Jumpers, one of the historic pacifist churches) and the Young Russian

Christian Association. [Ex 15] He regularly attended the YRCA Wednesday night Bible classes and the Sunday services. [R 37] He followed the directions on this Special Form and chose to strike out Series I (A), the non-combatant claim, and signed Series I (B), the "complete" conscientious objector claims. He was classified in Class IV-E. At that time Class IV-E was the classification for "complete" conscientious objectors, those whose scruples extended to entering the armed services in any capacity. The classification was later termed I-O on 28 September 1951.

He was reclassified in Class I-O on November 23, 1951 and on October 22, 1952 he was sent a "volunteer" form for certain work. He did not volunteer but chose to await his selective service call. Without any other intervening fact he was reclassified into Class I-A on November 14, 1952 and thereafter notified.

His timely complaint of November 25th [Ex 31] was answered by a request that he present himself before the board for an interview on December 5, 1952. [Ex 34] The "interview" consisted of a stereotyped list of questions to determine if he was a pacifist or if he believed in self-defense. [Ex 35] His answers indicated he did believe in self-defense, and on the same day he was again reclassified in Class I-A. [Ex 11]

In his subsequent administrative appeal he received an adverse recommendation from the Department and was once again reclassified in Class I-A. It appears from the evidence that the recommendation of the Department was at least in part based on such considera-

tions as the irregularity of his church attendance, [Ex 50] and that he was said to have considered taking a job in a defense plant. [Ex 52]

During the trial the following transpired:

1. Defendant's subpoena *duces tecum* (FBI and Hearing Officer report) was quashed. [R 26]
2. The government introduced the selective service file as its sole evidence. [R 25]
3. A selective service official testified that the board did not post the names and addresses of Advisors to Registrants, and in fact, had none. [R 35]

When appellant was ordered to report for induction he did so but announced he would refuse to submit to induction. [Ex 35, 36] There is no evidence in the Exhibit, or in the Record, that appellant was informed of the penalty for refusal and thereafter asked to take the "step forward" at the induction station, this being required by the regulations.

QUESTIONS PRESENTED AND HOW RAISED

I.

Concerning the Hearing Officer hearing:

A. Appellant attacked the procedure of the Department of Justice is not sending copies of the Hearing Officer's report (to the Department) and of the Attorney General's recommendation (to the Appeal Board) to the registrant before the Appeal Board acted. This point (and the following ones) were raised by Motion for Judgment of Acquittal. [R 8, 20, 36] The question presented is whether this procedure conforms to due process requirements. Appellant will argue that the recent Supreme Court decision in *Gonzales vs. United States* is dispositive of the question.

B. Appellant attacked the Regulations and the procedure of the Department of Justice in not placing in the registrant's selective service file a copy of the Hearing Officer's report to the defendant. [R 57, No. VII]

The question presented is somewhat similar to A above.

C. Appellant's evidence also factually attacked the fairness of the Hearing Officer having principally, that submitted material favorable to him, as well as rebuttal evidence, was not forwarded to the Appeal Board. [R 37, 39, 45]

The question presented is whether this situation is covered by the recent Supreme Court decision in *Simmons v. United States.*

D. Appellant attacked the advisory recommendation of the Department of Justice to the Appeal Board as being arbitrary and unsupported by any evidence. [R. 7]

The question presented is whether there was any evidence to support the conclusion and recommendation of the Department.

E. Appellant attacked the bona fides of the Hearing Officer's report and issued a subpoena *duces tecum* for the production of the Hearing Officer's report and the FBI investigative reports so they could be compared. The subpoena was quashed. [R 26]

II.

Concerning failure of the local board to post names and addresses of Advisors to Registrants. [R 7, 35]

It will be submitted that this Court's decision in *Chernekoff v. United States* is dispositive of this question.

III.

Concerning failure of proof of the crime charged; the evidence in this case that there was only a verbal refusal to submit and that there was no warning of the penalty [R 60 and 61] is identical to Chernekoff's and appellant will submit that this Court's decision in *Chernekoff v. United States* is dispositive of this problem.

IV.

Concerning no basis in fact for this I-A classification:

A. Appellant attacked the reclassification from Class I-O to Class I-A as an act based solely on invalid and artificial reasons. [R 27-28, 35-36]
Appellant will submit that several recent decisions of this Court cover this situation. (Frank, Goetz, Hinkle, Blevins and Clark)

B. Appellant attacked the adverse recommendation of the Attorney General, used and relied upon by the Appeal Board, as unsupported by any proper factual basis. [R 50-51]
Appellant will ask this Court to rule as did the Tenth Circuit in *Annett.*

C. Appellant attacked the I-A classification as having no basis in fact, being contrary to appellant's *prima facie* case, and not being rebutted by any evidence or by any finding of inconsistences or lack of veracity.

V.

Appellant raised a point by issuing a subpoena to the FBI and the Hearing Officer for their secret reports concerning him. The subpoena was quashed. [R 26]

This question was decided adversely to appellant's contention by this Court but the matter is now before the Supreme Court.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motions for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

POINT ONE

The facts surrounding the Hearing Officer hearing reveal four denials of due process. The Supreme Court recently disposed of two of the points in accord with appellant's position in *Gonzales* and of another in *Simmons;* this Court may choose to also rule on the fourth point.

POINT TWO

It is a denial of due process for a local board to fail to have Advisors to Registrants.

Chernekoff vs. United States, supra.

If a showing of prejudice is needed this appellant's evidence met the test.

POINT THREE

There is a failure of proof of the crime charged. *Chernekoff,* supra is squarely in point.

POINT FOUR

There was no basis in fact for denying appellant a conscientious objector classification; at the very least he should have received a I-A-O classification. The reasons for denying him at least such a classification have been discredited by this and other courts.

ARGUMENT

POINT I.

THE CIRCUMSTANCES CONNECTED WITH THE PART PLAYED BY THE HEARING OFFICER IN THE ADMINISTRATIVE APPEAL, REVEAL ONE OR MORE DENIALS OF DUE PROCESS.

A. No copy of this officer's report to the Department was ever placed in the file or sent appellant. [R 36] This failure to afford registrants an opportunity to rebut adverse evidence, and the conclusions of the hearing officer is the result of two things: (1) the absence of a selective service regulation requiring that the registrant be given such an opportunity and (2) the policy of the Department of Justice not to give the registrant copies.

This situation was recently considered by the Supreme Court and it declared invalid the procedure of the Department in deciding conscientious objector cases. It held that the above procedure constituted a denial of due process.

It is submitted that *Gonzales vs. United,* ..... U. S. ....., No. 69, decided March 14, 1955, is dispositive of the question.

B. No copy of the Department's recommendation was placed in the file until after the Appeal Board's decision.

The comments on "A", above, apply equally to this point.

C. The undisputed evidence is that the appellant gave the Hearing Officer of the Department of Justice material information, not contained in the file and that neither it, nor a summary thereof, appears in the only document transmitted by the Department of Justice to the appeal board, to-wit, the letter of adverse recommendation by the Attorney General, now designated pages 50-51 of the selective service file. [Ex 50-51]

The factual basis for this sub-point is found in the Record on pages 51-.....

It should need little argument that such a failure by the Hearing Officer is prejudicial to the registrant and a denial of due process. There are no cases on this point. This Court, in *Linan vs. United States,* 202 F. 2d 693, 694, commented "It goes without saying that an Advisory Report could be so factually incorrect as to vitiate its usefulness, but we have no such situation here." The Court's reference was to the report of the Hearing Officer to the Attorney General. It is the obverse of the same coin described by the Supreme Court in *Simmons vs. United States,* ..... U. S. ....., No. 251, decided March 14, 1955.

D. The conclusions in the two Department of Justice documents are inconsistent with and are not supported by the findings of fact. It is noticeable that the conclusions of the Attorney General and the Hearing Officer find no support in the facts cited in the Resume of the FBI findings [Ex 52] or in the findings of fact in the Attorney General's letter to the appeal board. [Ex 50-51]

That is, the type of facts that are presented afford no legal basis for the adverse conclusion. See *Annett vs. United States,* 205 F. 2d 689, 692. This Court should rule likewise. Such items as infrequent church attendance are no basis. This was well stated in *United States vs. Keefer,* (NDNY, decided Aug. 2, 1954) Stephen W. Brennan, Judge: "The question here is the sincerity of the registrant's belief which must have been influenced by training and experience. Church membership, activity, or lack of them are not determinative. (32 CFR 1622.1(d); *Annett vs. United States,* 205 F. 2d 689)." Nor is willingness to work in a defense plant a basis for denying both of the conscientious objector classifications. *Franks vs. United States,* (9 Cir., 216 F. 2d 266.)

POINT II.

DEFENDANT WAS DENIED DUE PROCESS IN THAT THE LOCAL BOARD FAILED TO HAVE AVAILABLE AN ADVISOR TO REGISTRANTS AND TO HAVE POSTED CONSPICUOUSLY OR ANY PLACE, THE NAMES AND ADDRESSES OF SUCH ADVISOR, AS REQUIRED BY THE REGULATIONS, AND TO THE DEFENDANT'S PREJUDICE.

The factual basis of this point and the argument are set forth in the Opening Brief of the companion case of *Kaline v. United States,* No. 14635. *Chernekoff v. United States,* ..... F. 2d ....., (9 Cir., No. 14370, decided February 24, 1955.

POINT III.

THERE WAS NO PROOF OF THE CRIME CHARGED IN THAT THERE WAS NO PROOF APPELLANT HAD BEEN WARNED OF THE PENALTY FOR REFUSAL TO SUBMIT TO INDUCTION AND THEREAFTER GIVEN THE OPPORTUNITY TO "STEP FORWARD."

The evidence in this case is identical (except for the name of selectee and the date of the above induction ceremony) with that in the case of *Chernekoff vs. United States,* supra. See pages 60 and 61 of the Exhibit.

It is submitted that the Chernekoff decision is dispositive of this point.

POINT IV.

THERE IS NO BASIS IN FACT FOR THE FINAL I-A CLASSIFICATION

The reclassification of appellant from Class I-O to Class I-A was made without basis in fact and was made solely because of invalid and artificial reasons.

The board reclassified appellant on November 14, 1952, from Class I-O to Class I-A. [See page 11 of Exhibit] The only factual matter intervening between the two classification actions (and unquestionably the basis for the latter) is found on pages 27 and 28 of the Exhibit. This fact did not afford a valid basis. A failure to volunteer, by a registrant in a selective service system is not a fair basis for demotion.

When appellant complained of the demotion and asked for a hearing, it was given him on December 5, 1952. The summary of said hearing appears on pages 35 and 36. It reveals that he believed in the use of force and self-defense. He was again reclassified into Class I-A. This Court has condemned such bases for denying a conscientious objector's classification. See *Hinkle vs. United States,* 9 Cir., 216 F. 2d 8, 10; *Blevins vs. United States,* 9 Cir., 217 F. 2d 506; *Clark vs. United States,* 9 Cir., 217 F. 2d 511.

It is evident that if this appellant should have been demoted at all it never should have been to any class lower than to Class I-A-O.

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

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